

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|--|---|--------------------------|
| In the Matter of |) | |
| |) | |
| Connect America Fund |) | WC Docket No. 10-90 |
| |) | WC Docket No. 14-259 |
| Broadband Rural Experiments |) | |
| |) | |
| Worldcall Interconnect, Inc. Petition for Waiver |) | FOR PUBLIC REVIEW |

**APPLICATION FOR REVIEW
BY
WORLDCALL INTERCONNECT, INC.**

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February 9, 2015

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EXECUTIVE SUMMARY

Worldcall Interconnect, Inc. seeks Commission review of the Wireline Competition Bureau's January 30, 2015 Order denying WCX's Petition for Short-Term Waiver. WCX is also requesting a stay of the Order pending review, by separate pleading.

WCX's "waiver" request for what was ultimately a forty-four day extension of time to supply "audited" financials in addition to the unaudited financial information it timely supplied should have been granted. The Commission should overturn the Bureau's Order and reinstate WCX as a qualified participant and broadband grant selected bidder.

Although it was styled as a request for waiver, the actual relief sought by WCX was a relatively short extension of time (forty-four days) to submit audited financials. WCX provided unaudited financials before the December 19 deadline. WCX timely supplied the outside engineer opinion and the required letter of commitment. WCX then completed the audit and it was provided to the Bureau on February 2, 2015, prior to the ultimate final deadline for bidders to supply the last set of financial capability demonstration materials and in advance of the time the Bureau actually needed the information. Thus, WCX has now entirely fulfilled all of Rural Broadband Experiments requirements, in advance of the ultimate final date for doing so. Nonetheless the Order removes WCX from further participation, and has already announced potential next-in-line bidders.

WCX will be irreparably harmed if the Bureau persists in removing WCX from further consideration and proceeds to award the funds provisionally awarded to WCX to a next-in-line bidder. The Bureau's declared intention to award the funds originally allocated to the most cost-effective bidder (WCX) to a less cost-effective bidder is inconsistent with the purpose of these

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experiments and it will skew the information gleaned from them. The Order effectively freezes out small business participation in these experiments.

The Order's findings and conclusions are (1) inapplicable as to WCX; (2) erroneous as to WCX; and, (3) contrary to Commission policy. The Order's rationales do not apply to WCX's specific request and situation. The result is contrary to reason and the policies and reasons the Commission is doing these experiments. The result also signals that the Commission is not interested in having small businesses participate in Commission endeavors such as this one.

WCX requests that the Commission order the Bureau to not proceed with an award of the funds originally awarded on a provisional basis to WCX pending disposition of this Application for Review. WCX further requests that the Commission grant this Application for Review and require the Bureau to reinstate WCX as a bidder for the area where it was provisionally selected and as a next-in-line bidder for the areas where WCX made a bid but was not provisionally selected.

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APPLICATION FOR REVIEW

Worldcall Interconnect, Inc. (“WCX”), by and through its undersigned Attorneys, and pursuant to Section 1.115 of the Commission’s rules, hereby submits this Application for Review of the Wireline Competition Bureau’s January 30, 2015 Order denying WCX’s Petition for Short-Term Waiver.¹ WCX is also seeking a stay of the Order pending review pursuant to Rule 1.102(b)(3). As required by Rule 1.44(e), the request for stay is being submitted by separate pleading.

WCX will show below that its “waiver” request for what was ultimately a forty-four day extension of time to supply “audited” financials in addition to the unaudited financial information it timely supplied should have been granted. The Commission should overturn the Bureau’s Order and reinstate WCX as a qualified participant and broadband grant selected bidder.

I. BACKGROUND AND INTRODUCTION

WCX is a wireless service provider offering advanced mobile telecommunications solutions to residents in thirteen counties in central Texas. The Texas licensed areas in issue are predominately sparsely populated, with many areas far removed from any towns or other

¹ *In the matter of Connect America Fund Rural Broadband Experiments*, Order, DA 15-139, Docket Nos. 10-90, 14-259, (Wireline Telecommunications Bureau, rel. Jan. 30, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-139A1.pdf. The Order was made pursuant to delegated authority.

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population centers of any significance. WCX is a small business and is not publicly traded. WCX has been in existence for more than three years, but has been operating its network for fewer than three years.

Although it was styled as a request for waiver, the actual relief sought by WCX was a relatively short extension of time (forty-four days) to submit audited financials. WCX provided unaudited financials before the December 19 deadline. WCX timely supplied the outside engineer opinion and the required letter of commitment. WCX then completed the audit and it was provided to the Bureau on February 2, 2015, prior to the ultimate final deadline for bidders to supply the last set of financial capability demonstration materials and in advance of the time the Bureau actually needed the information. Thus, WCX has now entirely fulfilled all of Rural Broadband Experiments requirements, in advance of the ultimate final date for doing so. Nonetheless the Order removes WCX from further participation, and has already released a list of potential next-in-line bidders.²

WCX will be irreparably harmed if the Bureau persists in removing WCX from further consideration and proceeds to award the funds provisionally awarded to WCX to a next-in-line bidder. The Bureau's declared intention to award the funds originally allocated to the most cost-effective bidder (WCX) to a less cost-effective bidder is inconsistent with the purpose of these experiments and it will skew the information gleaned from them. The Order effectively freezes out small business participation in these experiments.

WCX requests that the Commission order the Bureau to not proceed with an award of the funds originally awarded on a provisional basis to WCX pending disposition of this Application for Review. WCX further requests that the Commission grant this Application for Review and

² Public Notice, Wireline Competition Bureau Announces Entities Under Consideration as Next-In-Line Bidders for Rural Broadband Experiments Support, DA No. 15-157, Docket Nos. 10-90, 14-259, (Wireline Telecommunications Bureau, rel. Feb. 3, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-157A1.pdf.

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require the Bureau to reinstate WCX as a bidder for the area where it was provisionally selected and as a next-in-line bidder for the areas where WCX made a bid but was not provisionally selected.

WCX timely submitted nine different broadband experiments bids. On December 5, 2014, the Commission announced the provisionally selected low bidders who were required to submit information demonstrating their financial and technical qualifications by December 19, 2014. WCX was provisionally selected for one bid covering 34 census blocks.³ On December 16, 2014 WCX filed a request for waiver of the requirement that it provide three years worth of audited financial statements in association with the materials to be submitted by WCX on December 19, 2014. WCX sought a short extension to comply with that requirement. WCX did not seek a waiver of any of the other requirements, and timely supplied the information demonstrating compliance with all requirements except for audit submission on December 19, 2014. WCX *did* provide the required audited information on February 2, 2015, and has now fully complied with every requirement.⁴

³ WCX was not provisionally selected for the eight other bids. WCX timely filed a notice that it wished to remain under consideration as a “next-in-line” bidder for all nine bids, *e.g.*, the eight bids for which it was not provisionally selected and then, in order to preserve all options, as a “next-in-line” for the one bid for which it was selected. The Order challenged in this Application “removed” WCX “from further consideration” for both the one bid where it was provisionally selected and the eight other bids where it sought to remain in contention as a “next-in-line.”

⁴ The Commission’s files demonstrate that WCX has completed all tasks. *See* Application to Bid in Auction 501, File Number: 0006588263, Submission Information:

ETC Designation Texas PUC ETC Order 1 12/8/2014, 2:51 PM

ETC Designation Texas PUC ETC Order 2 12/8/2014, 2:52 PM

ETC Designation Texas PUC 2014 Report 12/8/2014, 3:01 PM

Spectrum Description Worldcall 700 B-Block 12/8/2014, 4:21 PM

Spectrum Description Worldcall 3650 12/8/2014, 4:21 PM

Spectrum Description 12/18/2014, 10:29 AM

Spectrum Description Licensed MW Wharton to Wallis 12/8/2014, 4:22 PM

Technology Description Technology and Network by PE 12/18/2014, 9:53 AM

Indirect Ownership Filing 12/12/2014, 12:46 PM

Financial Attachment 1 12/18/2014, 10:13 AM

Financial Statements 2011- 9-2014, Unaud 12/18/2014, 10:14 AM

WCX-Financial Discussion 12/18/2014, 12:38 PM

Audited Financial Statements 2/2/2015, 3:46 PM

Commitment Letter Frost 1/28/2015, 2:31 PM

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The Bureau denied WCX's request as part of an *en mass* denial of all relief by all provisionally-selected bidders that had sought waivers in whole or in part for each of the three main requirements: audited financials, certification by a registered professional engineer and a qualifying letter of commitment from a qualifying financial institution.

The Order's rationale appears in ¶¶1, 5, 6, 7 and 9. The pertinent parts (without the footnotes) are provided here for convenience.

1. ... Because we do not find good cause to waive the requirements established by the Commission, we remove these entities from further consideration for rural broadband experiments support. Collectively, these applicants sought almost \$55 million in funding, which will now be available to other bidders. We will announce the provisionally selected next-in-line bidders in a future Public Notice.

5. We conclude that the standards for waiver have not been met. While some Petitioners seek a waiver to have more time to fulfill the requirements established by the Commission, and other Petitioners seek a waiver because they are unable to meet the requirements for the experiments, we conclude that the public interest would not be served by granting these waivers. We conclude that strict enforcement of the deadlines and filing requirements adopted by the Commission is appropriate given the accelerated time frame for the rural broadband experiments. Granting such relief would preclude consideration of other applicants that were able to submit the requisite financial and technical showings within the time frame established by the Commission. Denying the waiver requests and proceeding to identify next-in-line bidders fulfills the Commission's objective for the rural broadband experiments to inform key decisions that the Commission would be making regarding the design of the competitive bidding process that will occur in Phase II of the Connect America Fund, while not delaying implementation of Phase II.

6. The Commission intended for the rural broadband experiments to provide critical information regarding the interest and ability of alternative providers to build networks that deliver robust services for an amount of money equal to or less than the support amounts calculated by the adopted Phase II Connect America Cost Model. Through both the expression of interest stage and the application stage of the experiments, we have learned a great deal about the level of competitive interest in providing such services. However, we must balance that interest with our duty as stewards of public funding. We therefore must ensure that the finite rural broadband experiments budget is distributed to entities that provide concrete evidence of their financial and technical capability to fulfill their commitment not only to build voice and broadband capable

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networks, but also to provide reasonably comparable services at reasonably comparable rates.

7. Several Petitioners submitted unaudited financial statements as alternative evidence of their financial capability. Though unaudited financial statements provide some detail regarding the financial state of an entity, they do not provide the same level of assurance as audited financial statements. By adopting the requirement to submit three years of audited financial statements, the Commission ensured that the financial picture of the selected bidders had been audited by a neutral third party – an independent certified public accountant that is subject to professional standards when reaching a conclusion whether the financial statements prepared by management are in accordance with Generally Accepted Accounting Principles and free from material misstatement. Given the accelerated timing of the rural broadband experiments, we are not convinced that the public interest would be served by granting the waiver requests. Doing so would provide less assurance regarding the true financial picture of the Petitioners and would likely require a more resource-intensive effort by the Bureau to assess the alternative financial materials of those entities seeking a waiver. This would divert the Bureau from fulfilling the Commission’s overarching objective of moving swiftly to implement Phase II.

9. We are not persuaded by arguments that the filing deadline of 10 business days following public notification of provisionally selected bidders was insufficient time for these bidders to obtain audited financial statements. All bidders have been on notice since the release of the *Rural Broadband Experiments Order* in July 2014 that the Commission required provisionally selected bidders to provide three consecutive years of audited financial statements within 10 business days of public notification of their selection. Any potential rural broadband experiments applicant should have factored this requirement, as well as all other rural broadband experiments requirements and obligations, into their initial decision to bid for support. We similarly are not convinced that we should provide additional time to certain entities to produce audited financial statements. All provisionally selected bidders had ample time—over five months from the release of the *Rural Broadband Experiments Order*—to prepare for this requirement. Moreover, the Commission recently affirmed the same 10 business day timeframe for entities interested in continuing to be considered for rural broadband experiments support in the event any of the provisionally selected bidders defaulted, and numerous other applicants were able to meet that deadline to submit the required information. Effectively extending the deadline for certain provisionally selected bidders to provide audited financial statements is unfair to those entities that took the necessary steps to comply with the requirement by the deadline.

WCX demonstrates below that these findings and conclusions are (1) inapplicable as to WCX; (2) erroneous as to WCX; and, (3) contrary to Commission policy. The Order’s rationales

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do not apply to WCX's specific request and situation. The result is contrary to reason and the policies and reasons the Commission is doing these experiments. The result also signals that the Commission is not interested in having small businesses participate in Commission endeavors such as this one.

II. ARGUMENT

- A. Rural Broadband Experiments orders contemplated case-by-case waivers might be necessary, and promised case-by-case analysis.

The *Technology Transitions Order*⁵ and *Rural Broadband Experiments Order*⁶ established the framework for the Rural Broadband Experiments process. *Rural Broadband Experiments Order* ¶54⁷ sets out the post-notice requirements for provisionally-selected bidders. One timing issue in one of the requirements created an obstacle for WCX.⁸ In specific, WCX

⁵ *Technology Transitions*, Order, 29 FCC Rcd 1433, at ¶ 128 (2014) ("*Technology Transitions Order*").

⁶ *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 8769 (2014) ("*Rural Broadband Experiments Order*").

⁷ See 29 FCC Rcd 8787-8788, ¶54 (notes omitted):

54. Within 10 business days of public notice of winning bidders, we require all winning bidders to provide the most recent three consecutive years of audited financial statements, including balance sheets, net income, and cash flow, and to submit a description of the technology and system design used to deliver voice and broadband service, including a network diagram, which must be certified by a professional engineer. Winning bidders proposing to use wireless technologies also must provide a description of spectrum access in the areas for which the applicant seeks support. Within 60 days of public notice of winning bidders, we require all winning bidders to submit a letter from an acceptable bank committing to issue an irrevocable stand-by original letter of commitment (LOC) to that entity. Finally, each selected applicant is required to provide within 90 days of public notice of winning bidders appropriate documentation of its ETC designation in all the areas for which it will receive support and certify that the information submitted is accurate. Once the Bureau has determined that the entity is financially and technically qualified to receive experiment support and that the LOC commitment letter is sufficient, it will release a public notice stating that the entity is ready to be authorized for support. Within 10 business days of this public notice, we require that the winning bidder submit an irrevocable stand-by original LOC that has been issued and signed by the issuing bank along with the opinion letter from legal counsel that we describe below. Once the Universal Service Administrative Company (USAC) has verified the sufficiency of the LOC and the opinion letter, the Bureau will issue a public notice authorizing the entity to receive its first disbursement.

⁸ Several other provisionally-selected bidders encountered significant difficulties with other requirements. WCX was able to meet all of the other requirements, but discovered that the letter of commitment specifics were surprisingly burdensome and difficult to meet. WCX shares many of the concerns that have now been raised about the current letter of commitment requirements and urges the Commission to use the experience gained to adjust its LOC specifics.

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could not provide 3 years of audited financial statements by December 19, 2014. WCX was able to secure and supply 3 years audited statements on February 2, 2015. Thus, WCX sought a **forty-four day extension** to fulfill the “audited” portion of the financial showing mandate. WCX did supply three years’ unaudited financials by December 19, and asserted that the unaudited information was reliable for the purpose of determining financial capability. The three years’ audit results that were then supplied 44 days later confirmed that this was so. WCX’s request was short, and minor in nature. It created no delay or difficulty.⁹ WCX’s extension request, especially given WCX’s subsequent cure forty-four days later and before complete compliance with all of the steps was required,¹⁰ gave rise to none of the concerns expressed in the Order that supposedly justified the Bureau’s rejection.

The *Technology Transitions Order* contemplated that waivers would be available. “[A]pplicants may request that the Commission waive a mandatory condition in an experiment by making a good cause showing that strict compliance is inconsistent with the public interest. Such requests should be accompanied by a good cause demonstration that a waiver is necessary to the experiment and that the experiment has sufficient value to justify the waiver.”¹¹ “Such requests should be accompanied by a good cause demonstration that a waiver is necessary to the experiment and that the experiment has sufficient value to justify the waiver”¹² by explaining

⁹ The Order states in ¶7 that relying on unaudited financials “would provide less assurance regarding the true financial picture of the Petitioners and would likely require a more resource-intensive effort by the Bureau to assess the alternative financial materials of those entities seeking a waiver. This would divert the Bureau from fulfilling the Commission’s overarching objective of moving swiftly to implement Phase II.” This statement speaks to the future (“would likely”, “would divert”) which means that the Bureau has not, in fact, performed the financial assessment. Now that WCX has supplied audited financials the Bureau will not face this problem when it does turn to the financial assessment.

¹⁰ Letters of Commitment were due on February 3. WCX submitted the LOC on January 28.

¹¹ *Technology Transitions Order*, 29 FCC Rcd at 1446, 1480, ¶¶37, 42.

¹² *Id.* at 1480, ¶142.

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that, among other things “compliance with a specific requirement is not necessary in the context of an experiment.”¹³ WCX did all of these things.

The Bureau – at least at one point – clearly understood that the general requirements could be waived and waivers would be evaluated on an entity and request specific basis.¹⁴ In contrast to the holding in the Order that the “strict enforcement of the deadlines and filing requirements” was required and no waivers would be allowed under any circumstances, for any provisionally-selected bidder¹⁵ the Bureau’s issued an FAQ explaining that bidders could request waivers (or presumably, as in WCX’s case a short extension) of the audited financial statement requirement and the request would be reviewed on a “case-by-case” basis.”¹⁶

On December 5, 2014, the Commission announced the provisionally selected low bidders who were required to submit information demonstrating their financial and technical qualifications by December 19, 2014. WCX was provisionally selected for 1 bid covering 34 census blocks. On December 16, 2014 WCX filed a request for waiver of the requirement that it provide three years worth of audited financial statements in association with the materials to be submitted by WCX on December 19, 2014. WCX stated that an audit was in progress and the audit would be immediately provided to the Commission when it was complete. It is important to clarify that WCX merely sought more time to submit the audit. The “waiver” request was actually an “extension” request – a short extension of time for WCX to complete and supply audited financials. WCX was not, unlike several others, seeking a complete waiver of the audit

¹³ *Technology Transitions Order* ¶128.

¹⁴ Rural Broadband Experiments – Frequently Asked Questions (FAQs), available at http://transition.fcc.gov/wcb/FAQs_Rural_Broadband_Experiments.pdf.

¹⁵ Order ¶5.

¹⁶ “If a winning bidder is unable to produce three consecutive years of financial statements, it should file a waiver of this requirement after it has been named as a winning bidder. An entity should submit with its waiver petition evidence that demonstrates it is financially qualified. We then determine on a case-by-case basis whether it can assess the entity’s financial qualifications using the alternative evidence provided.”

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requirement. The extension was quite short, a period that ended up being a mere forty-four days.

The Bureau released the comment cycle on WCX's waiver request and waiver requests by other provisionally-selected bidders¹⁷ on December 23, 2014.¹⁸ WCX filed a supplement to its original waiver request on December 24, 2014. WCX further clarified – so the nature of the request was obvious – that WCX was not seeking a complete waiver of the requirement for audited financial statements; rather, WCX merely sought more time. Thus the “waiver” request was actually an “extension” request. WCX indicated that the audit would be completed on January 31, 2015 and WCX would immediately upload the documents. WCX did so on February 2, 2015. WCX has also wholly fulfilled all other obligations, including a report by a registered professional engineer and – although it was difficult to say the least – a fully-compliant letter of commitment. WCX therefore met each and every all requirement on February 2, two days before the final deadline.

It bears repeating that although it was styled as a request for waiver, the actual relief sought by WCX that was denied by the Order was a relatively short extension of time to submit audited financials as a supplement to the unaudited financials that WCX timely submitted prior

¹⁷ See *Mercury Wireless, Inc. Petition for Waiver of Requirement to Provide Three Years of Audited Financial Statements by December 19, 2014 for Rural Broadband Experiments Post-Selection Review*, WC Docket No. 10-90 (filed Dec. 19, 2014) (*Mercury Petition*); *Rural Broadband Services Corporation, Inc. Request for Waiver of Requirement for Three Years of Audited Financial Statements*, WC Docket No. 10-90 (filed Dec. 18, 2014) (*RBSC Petition*); *AirNorth Communications, Inc. Petition for Waiver of Audited Financial Statements*, WC Docket No. 10-90 (filed Dec. 17, 2014) (*AirNorth Petition*); *Brainstorm Internet Petition for Waiver of Requirement to Provide Three Years of Audited Financial Statements for the Post Selection Review In the Matter of Connect America Fund Rural Broadband Experiments*, WC Docket No. 10-90 (filed Dec. 18, 2014) (*Brainstorm Petition*); *Crystal Broadband Networks Petition for Waiver*, WC Docket No. 10-90 (filed Dec. 17, 2014) (*CBN Petition*); *Tower Communications, LLC Petition for Waiver of Requirement to Provide Three Years of Audited Financial Statements for the Post Selection Review In the Matter of Connect America Fund Rural Broadband Experiments*, WC Docket No. 10-90 (filed Dec. 19, 2014) (*Tower Petition*); *Chafee County Telecom, LLC Request for Waiver*, WC Docket No. 10-90 (filed Dec. 19, 2014) (*Chafee Request*); *De Novo Group Request for Waiver*, WC Docket No. 10-90 (filed Dec. 16, 2014) (*De Novo Request*); *Declaration Networks Group Petition for Waiver*, WC Docket No. 10-90 (filed Dec. 11, 2014) (*DNG Petition*).

¹⁸ See Public Notice, Wireline Competition Bureau Announces Availability of Additional Funding for Rural Broadband Experiments; Seeks Comment on Waiver Petition of Provisionally Selected Bidders, DA 14-1889, WC Docket Nos. 10-90, 14-259 (rel. Dec. 23, 2014) (*Waiver Public Notice*).

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to December 19th. The independent auditors report validated the showing in the unaudited financials that WCX was financially capable. WCX sought no other relief, and timely submitted the outside engineer opinion and the letter of commitment. WCX then completed the audit and it was supplied on February 2, 2015, prior to the ultimate final deadline for bidders to supply the last set of financial capability demonstration materials. Thus, WCX has now entirely fulfilled all of Rural Broadband Experiments requirements, and did so in advance of the ultimate final date for doing so.

- B. The Bureau erred by denying all waivers without individual analysis of WCX's specific situation and request.

WCX's case was different from the other waiver petitioners, in that its request related to timing, and it was of very short duration. WCX did not seek a waiver of any substantive requirement in any respect. Further, WCX has now supplied the required audit, and the extension period is now known: forty-four days.¹⁹ WCX has wholly met every requirement, other than the timing of audit submission, which was supplied on February 2, 2015 rather than the December 19, 2014. As far as WCX can determine no other waiver petitioner has "cured" any defect. WCX is unique in this respect among all other waiver petitioners.

The Order states in ¶7 that relying on unaudited financials "would provide less assurance regarding the true financial picture of the Petitioners and would likely require a more resource-intensive effort by the Bureau to assess the alternative financial materials of those entities seeking a waiver. This would divert the Bureau from fulfilling the Commission's overarching objective of moving swiftly to implement Phase II." This statement speaks to the future ("would likely", "would divert") which means that the Bureau has not, in fact, performed the financial

¹⁹ WCX's waiver submissions advised the Bureau that WCX would have its audit in hand by the first week in February. The Order was issued on January 30. WCX uploaded the audit materials one business day later, on February 2.

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assessment. Now that WCX has supplied audited financials the Bureau will not face this problem when it does turn to the financial assessment. But even more important, the Order nowhere explains how not having WCX's audit for a mere forty-four day period would or did impact or impede the Bureau's progress in any way. Paragraph 7 speaks to *not having* audits at all; it does not address WCX's situation, where the audited information has been provided, albeit forty-four days after it was initially due.

The Order heavily relied on perceived instructions from the Commission's *December CAF Order*²⁰ and in particular ¶¶83-84, which emphasized a need for three years' of audited information prior to the time the Wireline Competition Bureau "finalizes the list of census blocks that will be offered to the price cap carriers for Phase II of the Connect America Fund."²¹ But the Commission's expressed "need for speed" does not apply here, because WCX's situation and request did not slow down or delay finalization of the list of census blocks that will be offered to price cap carriers in Phase II. In WCX's specific case the Bureau erred in its reliance on and interpretation of the *December CAF Order*.

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²⁰ *Connect America Fund; ETC Annual Reports and Certifications; Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket Nos. 10-90, 14-58, 14-192, Report and Order, FCC 14-190, __ FCC Rcd __ (rel. Dec. 18, 2014) ("*December CAF Order*").

²¹ See Order ¶5 and note 14, ¶8 and note 21, ¶9 and note 27. The

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[REDACTED]

[REDACTED] END CONFIDENTIAL]

In any event, WCX has now supplied audited information, and has done so in advance of the Bureau's finalization of the list of census blocks that will be offered to the price cap carriers for Phase II of the Connect America Fund or the final list of broadband experiments blocks. The Phase II Challenge process is moving to completion, but the Bureau has not concluded that process. Challenge process replies were filed on November 10, 2014, and filings continue to be made in Docket 14-93, with the most recent occurring on January 27, 2015. A fairly large number of challenges and census blocks must still be decided before the list of census blocks that will be offered to the price cap carriers for Phase II is known.

According to the Public Notice announcing the Challenge Response round date (DA 14-1397), the Bureau found that 20,183 challenges (related to 19,753 unique census blocks) made a valid *prima facie* case that a census block should be treated as served. There is obviously a lot of work remaining to be done and although the Commission hopes it will be completed in "early 2015" the challenge process determinations have not yet been made.

It is also important to keep in mind that the challenge resolution determinations must be completed before any broadband experiments awards can be finalized. DA 14-1397 note 27 correctly observes that "[t]he determinations of the challenge process will also be used in the rural broadband experiments. For example, if the challenge process ultimately determines a given census block to be served, funding for that particular census block will not be available in the rural broadband experiments." This means that the ultimate broadband experiment funding awards can only occur *after* the complete list of eligible census blocks flowing from the challenge process has been compiled. The forty-four additional days needed by WCX to secure

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audited financials did not in any respect slow anything down, cause any delays or impose any additional analysis burdens on the Bureau.

There is no indication that the Bureau has in fact started the “financial capability” analysis that it claims can only be expeditiously done if there are third-party independent audits. Indeed, they cannot have done so, since the letter of commitment – which was due on February 3 – is an important aspect of the “financial capability” assessment, and the complete assessment obviously cannot proceed until the letter of commitment is also in hand.²² The Bureau has WCX’s letter of commitment, and audited financials. They can now begin, and swiftly complete, the financial capability analysis.

While WCX does not necessarily accept the Bureau’s contention that relying on unaudited material would be burdensome, consume resources or inject delay, the simple fact is that the Bureau now has audited WCX information and a compliant letter of commitment they can use when they begin to evaluate whether WCX is financially capable (which it undoubtedly is).

If the Bureau had taken into account that WCX was going to supply the audited material on February 2, and finish the financial demonstration with the letter of commitment WCX submitted on January 28 several days before the January 3 deadline it would (or should) have not reached the result that it did in the January 29 Order. The basis for denial in the Order does not apply to WCX. Therefore, it is clear the Bureau did not conduct any individual assessment of WCX’s waiver (extension) request, but that is precisely what is required by the rules, good public policy and *Technology Transitions Order* §§37, 42, 128 and 142. In any event, since the

²² Order §§10 and 11 explain that the financial evaluation has two inputs: financials and the letter of commitments. They also reveal that as a practical matter the assessment could not truly begin until after letters of commitment were submitted on February 3. WCX, therefore, was not “late” in the sense that the forty-four day extension prevented the Bureau from starting or completing anything and also did not require use any administrative resources.

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rationale in the Order does not apply to WCX, the Bureau committed error when it denied WCX's individual request based on that inapplicable rationale.

The Bureau made "an erroneous finding as to an important or material question of fact"²³ because WCX's request did not require the Bureau to "assess [WCX's] alternative financial materials" nor did it in any manner "divert the Bureau from fulfilling the Commission's overarching objective of moving swiftly to implement Phase II." *C.f.* Order ¶7. "[S]trict enforcement of the deadlines" as to WCX is not necessary or appropriate because WCX's request did not in any way impact, complicate or slow the Bureau's work to meet "the accelerated time frame for the rural broadband experiments." *C.f.* Order ¶5. The Bureau also committed prejudicial procedural error²⁴ because it ruled on WCX's request without the required individual, case-by-case analysis that would have revealed that WCX's forty-four day extension still gave everything the Bureau needed by February 3, which was the date the last piece of the financial showing (letter of commitment) was due and the financial analysis could begin. The *en mass* denial included WCX, but it was based on rationales and factors that simply did not apply to WCX's unique situation or request.

- C. The Bureau made an erroneous policy determination with regard to WCX's specific situation and request.

The Bureau's action taken pursuant to delegated authority is in conflict with precedent and Commission policy.²⁵ The Order leads to results inconsistent with the purposes and policies expressed by the Commission when it created these broadband experiments.

²³ Rule 1.115(b)(2)(iv).

²⁴ Rule 1.115(b)(2)(v).

²⁵ Rule 1.15(b)(2)(i).

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1. The Order eliminates the most cost-effective bidder.

In the *USF/ICC Transformation Order*, the Commission concluded that it would use a competitive bidding mechanism for Phase II of the Connect America Fund to award support in price cap territories in those states where price cap carriers decline to make a state-level commitment in exchange for model-based support. In the January 2014 *Tech Transitions Order*, the Commission adopted an experiment to test how tailored economic incentives can advance the deployment of next generation networks, both wireline and wireless, in rural, high-cost areas, including Tribal lands.

Broadband Experiments Order ¶1 (notes omitted).

The Commission weighed a range of selection criteria for interested bidders proposing to build compliant projects in eligible areas. It ultimately, however, decided to “select winning bidders based on objective measures of cost-effectiveness, rather than using a more complicated scheme of weighting or scoring applications on multiple dimensions.”²⁶ “[F]or those applications proposing to serve census blocks identified by the Connect America Cost Model as eligible for Phase II support, we will compare requested amounts to model-based support amounts. For applications proposing to serve only census blocks the model identifies as ‘extremely high-cost,’ for which there is no model-determined level of support, we will select applications based on the lowest-cost per location. We find that using these objective, straightforward, and easily measurable criteria will best meet our goals to efficiently distribute support in these experiments and to test on a limited scale a competitive bidding process that can be implemented quickly to inform our decisions regarding how to design the Phase II competitive bidding mechanism.”²⁷ Selections for categories one and two “use cost-effectiveness – defined as requested dollars per location divided by model-based support per location.”²⁸ For category three selections the Commission “will calculate the cost per location, and rank these applications on a dollar

²⁶ *Id.* ¶31.

²⁷ *Id.* ¶32.

²⁸ *Id.* ¶33.

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requested per location basis, from lowest to highest. We will select projects based on the lowest cost per location, until the budget is exhausted.”²⁹

WCX was the provisionally-selected carrier for one of its nine bids. This was a category three bid.³⁰ The Bureau selected only nine category three bids in total. WCX therefore submitted an extremely “cost-effective” bid when measured on a per-location basis. It was most certainly the most cost-effective bid for the census blocks involved.³¹

The purpose of these experiments is to “inform [the Commission’s] policy decisions in various pending proceedings” and “learn whether providers are willing and able to deliver services with performance characteristics well in excess of the minimum standards that price cap carriers accepting model-based support are required to offer to all funded locations, for at most the same amount of support as calculated by the model.”³² The Order disqualifies a very cost-effective bid purely for timing issues, and will lead to a higher cost replacement. This will skew the results, and in the long term lead to bad information indicating that broadband costs more than it really does, as measured by the relative cost-efficiency indicated by private bidding.

WCX offered a series of bids – one accepted and eight for which WCX wishes to remain in consideration – that will facilitate broadband deployment in unserved areas. WCX obviously made the best bid in one area. Disqualification is inconsistent with the goals behind the Commission’s Rural Broadband Experiments. If WCX is disqualified and taken out of further consideration merely because of an inconsequential timing issue the Commission will deny broadband to the residents in the census blocks that WCX won and those where WCX still seeks

²⁹ *Id.* ¶37.

³⁰ WCX also made eight other bids, some of which were category two. As noted WCX timely filed to remain in consideration for all bids, but the Order completely removes WCX from further consideration for the one accepted bid and the remainder despite WCX’s expression of continued interest.

³¹ *See Id.* ¶38 (“No census block will receive support from more than one proposal.”)

³² *Id.* ¶3.

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consideration. This could be their only opportunity to get access to broadband for years to come. And, as noted, the bad information resulting from the higher-cost replacement will create negative consequences for the entire universal support paradigm because it will send incorrect cost/price signals. The Order will not lead to *properly* “tailored economic incentives” that will “advance the deployment of next generation networks.”³³

Order ¶6 admits that “[t]hrough both the expression of interest stage and the application stage of the experiments, [the Bureau has] learned a great deal.” But the Order fails to recognize some other things the Bureau *should have* learned, and it clearly does not take into account many things that the bidders themselves learned and have experienced along the way. Some of the preconceived notions held by both the Commission and the participants have been shown to be incorrect, particularly with regard to the costs and risks attending to bidding and then the specifics of what the post-selection requirements entail when it came to the formal financial capability demonstration (*e.g.*, financial presentation and letters of commitment³⁴) by small businesses in rural areas. The Order disqualifies a host of small business entities that collectively had been awarded more than half of the provisional selections. The Order impacts more than half of the entire budgeted amount for broadband experiments. Most of the disqualified entities are financially capable but simply could not meet certain time-lines or particular formalities that do

³³ *Id.* ¶1.

³⁴ The Bureau obviously understands that, at least with regard to the letters of commitment, there is a serious problem that has broad implications for the entire Phase II competitive bidding process. Although the *Order* denies all LOC waivers for this part of the broadband experiments process the Bureau is now seeking comment on whether the LOC requirements should be changed going forward. *See*, Public Notice, Wireline Competition Bureau Seeks Comment on NTCA’s Emergency Petition for Limited Waiver of Rural Broadband Experiment Letter of Credit Bank Eligibility Requirements; Also Seeks Comment More Generally on Bank Eligibility Requirements for Connect America Phase II Competitive Bidding Process, DA 15-158 WC Docket Nos. 10-90, WC Docket No. 14-259 (rel. February 4, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-158A1.pdf; Public Notice, WCB Seeks Comment on the Alliance of Rural Broadband Applicants’ Petition For Limited Waiver of Certain RBE Letter of Credit Requirements; Also Seeks Comment More Generally on Letter of Credit Proposals for CAF Phase II Competitive Bidding Process, DA 15-140 WC Docket Nos. 10-90, WC Docket No. 14-259 (rel. January 30, 2015), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-140A1.pdf.

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not in fact bear on or ultimately prove or disprove financial capability. They are predominately small businesses. The most cost-effective bids are now gone. Higher cost, less effective bids will be used instead. This is an entirely irrational and inequitable result.

2. WCX's request did not implicate or undercut the Commission's "duty as stewards of public funding."

Order ¶6 says, in pertinent part (note omitted):

...Through both the expression of interest stage and the application stage of the experiments, we have learned a great deal about the level of competitive interest in providing such services. However, we must balance that interest with our duty as stewards of public funding. We therefore must ensure that the finite rural broadband experiments budget is distributed to entities that provide concrete evidence of their financial and technical capability to fulfill their commitment not only to build voice and broadband capable networks, but also to provide reasonably comparable services at reasonably comparable rates.

Clearly lessons have been learned by all involved. The Order, however, conveniently ignores that lessons took place and problems have been discovered after the application stage as well. The Commission must of course "ensure that the finite rural broadband experiments budget is distributed to entities that provide concrete evidence of their financial and technical capability to fulfill their commitment" The Bureau's legitimately expressed desire and need to balance these lessons and experiences gained during the process with the duty to exercise responsible stewardship is reasonable when *the stewardship duty is actually implicated or undercut*.

No balancing was required in WCX's situation. WCX has now provided exactly what was demanded and necessary for the financial capability assessment, and was able to do so before the information was actually needed. The Bureau has WCX's audited financials and it can rely on them when it ultimately turns to making financial assessments for selected broadband experiments after the Phase II challenge determinations are made and the final eligible census blocks are known. A good "steward" would have granted WCX's request since it did not actually

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implicate or undercut the Bureau's delegated duty to analyze or oversee this process and the associated funds.

3. The Order freezes out small businesses.

Paragraph 9 rationalizes that "strict enforcement" must ensue. It claims that "lessons learned" must be set aside and ignored. Ultimately, the Order claims that waiver denial – even in WCX's case where an inconsequential extension was sought – is appropriate because "everybody knew the rules." But the very problem is that "the rules" have been shown to disproportionately and uniformly impose special burdens on small businesses. In WCX's case, it was the cost and timing of the required outside audit. As explained below, WCX simply could not expend the tens of thousands of dollars in audit costs in advance of any award, until at least January of 2015. The burden was too high and the risk was too great. Although the specifics varied in each case, all of the other small business waiver petitioners were in the same position.

Experience gained and lessons learned showed there were a couple of discrete problems. Since these are experiments, it should come as no surprise that some of the original rules and requirements ultimately turned out to have some issues. The Commission anticipated, indeed expected, that this would be so. That is why the availability of future case-by-case waivers was repeatedly and emphatically offered in the *IP Transitions Order* and the *Broadband Experiments Order*.

WCX had good and solid reasons to not have historical audited statements: it never needed them, and therefore did not spend to money to obtain them. WCX is a small business and is not publicly traded. WCX has no business or legal reasons to obtain audited statements. This is not something required for small businesses in the ordinary course. They are costly, and the expense serves no existing non-regulatory or business purpose. The need for an audit and the

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cost arise solely for regulatory reasons associated with the broadband experiments. As a small company WCX would not normally justify spending [BEGIN CONFIDENTIAL ██████████ END CONFIDENTIAL]³⁵ for audits based purely on a hope and prayer that it *might* prevail in enough of the bidding rounds that the support funds would exceed the cost of the audit itself and significantly defray other justifiable and necessary costs. Responsible small businesses – those that succeed in the market – do not so cavalierly expend precious resources on this kind of gamble. Responsible small businesses do not pay good money for audited statements covering past periods when no outside party requires such audited statements. Wasteful and inefficient expenditures on unnecessary and risky endeavors is exactly what turns many ongoing small businesses into failures that disappear from the market.

The question before the Bureau in WCX’s case was how much value would be lost by not having “audit” financial information for a little more than 40 days, many of which are weekend and/or holiday. What harm was caused? Did not having “audit” financials until February 2, 2015 prevent the Commission from performing some essential task or threaten its stewardship obligations? Then there is the question of what purpose, if any, is served by disqualifying WCX based purely on the absence of “audit” financials during this brief period. The result denies support to the area involved if there is no “next-in-line” bidder, or providing higher support to the less cost-effective “next-in-line” bidder. WCX submits that no deployment, or deployment at higher cost, is not in the public interest. And, the simple fact is that no harm accrued from the forty-four day delay. Thus, the Bureau should have found that granting the request served the public interest and the extension was warranted under the specific circumstances at hand.

³⁵ The public filing for another entity seeking a waiver in association with an effort to preserve “next-in-line” status notes their cost for an audit is “at a minimum, \$50,000, or more.” See *Computer 5, Inc. d/b/a LocalTel Communications Petition for Waiver*, p. 2, WC Docket Nos. 14-259, 10-90 (filed Jan. 6, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001012548>.

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Footnote 185 to the *December CAF Order* in particular has several general findings that cannot reasonably be applied to WCX. In pertinent part note 185 states that “[a]ll serious bidders should have been prepared to submit their financial and technical information within ten days of the release of the Public Notice announcing the winning bidders, so this imposes no additional burden on them.”³⁶ The conclusion that any and all “serious” bidders “should have been prepared” to submit audited financial information within ten days of December 5, 2014 cannot reasonably or responsibly be applied to WCX.

WCX is undoubtedly “serious” in its bid efforts. WCX has participated from the beginning, and has devoted an extraordinary effort and amount of resources to this matter. WCX designed the network (and paid a registered engineer to certify). WCX has now expended a significant sum to a qualified bank to secure the letter of commitment. The attorney drafting and filing the pleadings associated with all of this is not doing the work *pro bono*. This is a serious matter, and WCX has taken it seriously from the start.

The general conclusion in footnote 185 implies that securing audited financials is not a “burden.” That may be so for publicly-traded companies, large entities with plenty of spare cash to throw around in order to merely be in position to bid on subsidies for high-cost endeavors or entities that must secure audits for other independent reasons, but that is not so for small, lean and smart companies that want to survive in the event they do not in fact win on enough bids to cover the audit cost and then apply the subsidy to actually building network. WCX has now paid [BEGIN CONFIDENTIAL ██████████ END CONFIDENTIAL] to obtain the audit, an activity for which WCX has no business need, purely for regulatory purposes. That is real money; indeed, it

³⁶ See also ¶86 “The submission of a network engineering diagram certified by a professional engineer and audited financial statements as described above provides some assurance that these are serious bidders prepared to participate in the Phase II competitive bidding process.” WCX has engineering diagrams from a professional engineer, so it meets that test for assurance regarding how “serious” it is.

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is almost [BEGIN CONFIDENTIAL [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. END CONFIDENTIAL]

Paragraph 86 goes on to state that “Moreover, entities with three years of audited financial statements by definition are ongoing businesses.” That is true, so far as it goes, but it fails to recognize that there are many “ongoing businesses” – including some that have been in business for many years – that have never had any need for audited financial statements. The Commission could not have meant to say that any entity without three years of audited financial statements is “by definition” *not* an “ongoing business.” WCX is definitely an “ongoing business.” It will remain one only if it continues to make smart decisions and refrains from spending precious resources on risky expenditures over future contingent events over which WCX has no control, and may not pan out. Recall that WCX submitted 9 bids, and was tentatively selected for only one. The Order reliance and rigid application of the general observations in ¶86 and note 185 has now unfairly and automatically excluded a large group of small businesses, all of whom are trying to stay in consideration, while still conserving cash in order to actually retain their “ongoing business” status in the event their bidding efforts for potential projects are not successful. The Order punishes small businesses for doing what all small businesses must do to simply remain in business.

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The Order relies on, and cites to, the oppositions filed by certain entities.³⁷ All of the opponents are larger companies, none of whom must contend with the obstacle at hand. Each of them did already have independent reasons for routine outside audits, wholly unconnected to broadband experiments.³⁸ The Bureau erred when it was swayed by their efforts to use their superior economic condition and different situation to take unfair advantage.

The Order punishes, and ultimately disqualifies, small business. The Commission should *want* small business participation because small businesses are far more efficient; their participation will give the Commission more accurate information regarding the true challenges and costs of deploying broadband in rural areas. Like WCX, these companies typically reside in the affected area, employ residents in the area and will be more attentive to the job of tending the needs of rural customers that both want and deserve broadband.

III. CONCLUSION AND PRAYER

This was, and will continue to be, a learning experience. Responsible administration of the programs that support rural and high-cost broadband to deserving Americans does, of course, require managerial prudence, vigilance and good stewardship. When – as is clearly the case here – “strict” enforcement of a timing requirement disqualifies more than half of the most cost-effective participants (virtually all of which are small businesses in rural communities) and one in particular that has now provided all of the information in advance of when it is actually needed, then it is time to reflect and dispense justice through an individual waiver for at least the one that had an inconsequential timing problem that has now been fully cured.

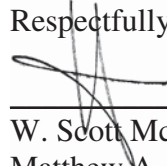
³⁷ Order footnotes 15, 16, 17.

³⁸ See WCX Reply to Comments pp. 14-17 (Jan. 13, 2015), public version available at <http://apps.fcc.gov/ecfs/document/view?id=60001013191>.

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The Order is not consistent with the Commission's policy and the purposes of these rural broadband experiments. WCX's waiver should have been granted. WCX respectfully requests that the Commission grant a stay of the Order, and upon full consideration overrule the Order and instruct the Bureau to reinstate WCX as a participant and grantee for all purposes.

Respectfully submitted,



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